

IN THE SUPREME COURT

**Appeal from the Michigan Court of Appeals
Before: Borrello, P.J., Murphy and Neff, JJ.**

**CHERYCE GREENE, as Personal Representative
of the Estate of Keimer Easley, Deceased,**

Plaintiff-Appellee,

Docket No. 127734

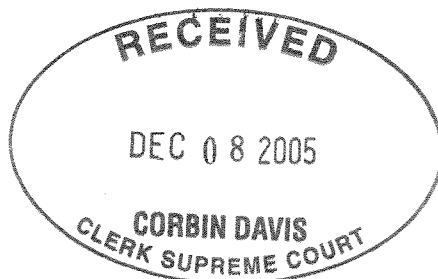
v

**A.P. PRODUCTS LIMITED, SUPER 7
BEAUTY SUPPLY, INC. and REVLON
CONSUMERS PRODUCTS CORPORATION,**

Defendants-Appellants.

**APPELLANT, SUPER 7 BEAUTY SUPPLY
INC. S' BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED



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BASIS OF JURISDICTION AND RELIEF REQUESTED

The Supreme Court granted Appellants' applications pursuant to this Court's October 19, 2005 Order [**Appendix 51a**]. This Court has jurisdiction in accordance with MCR 7.301(2) which permits the Supreme Court to review by appeal a decision by the Court of Appeals. The Court of Appeals decision is *Greene v A.P. Prods*, 264 Mich App 391 (2004). [**Appendix 39a**]

This Court's Order Granting Leave, reflected four issues that this Court requested be briefed: 1) whether the Court of Appeals erred in using a subjective rather than an objective standard in its analysis of the open and obvious doctrine; 2) whether the Court of Appeals erred in concluding that the product at issue was not a "simple" product; 3) whether the Court of Appeals erred in failing to recognize Plaintiff-Appellee Greene as a sophisticated user; and 4) whether aspiration of this product is a foreseeable misuse and should the material risk of misuse be obvious to a reasonably prudent product user. In addition, Appellant Super 7 Beauty Supply, Inc. requests that this Court review the limited liability of a non-manufacturing seller pursuant to tort reform legislation found at MCL 600.2947(6).

The Court of Appeals erred when it ruled that on one hand it was reasonably foreseeable for the Plaintiff-Appellee Greene to have known that ingestion of a hair care product could be harmful, but that on the other hand since this ingestion actually caused the death of her son, that an issue of fact is thus created on whether a warning was necessary. This apparent inconsistency in the Court of Appeals decision, employing both subjective and objective analysis in the open and obvious doctrine, needs to be resolved by this Honorable Court. The Court of Appeals determined that it cannot be concluded as a matter of law, that the risk of death or fatality from the ingestion of Ginseng Miracle Wonder 8 Oil hair product would be obvious to a reasonably prudent product user and be a matter of common knowledge without any relevant warning, while conceding that the risk of harm would be obvious to this same user.

As to the liability of a non-manufacturing seller, Super 7 Beauty Supply, Inc. contends that the only theory of liability against Super 7 should be for breach of implied warranty. In *Bouverette v Westinghouse Electric Corp.*, 245 Mich App 391 (2001) the Court of Appeals held that

in a claim for breach of implied warranty, a plaintiff must prove that the product was not reasonably fit for its intended, anticipated or reasonably foreseeable use. *Id* at 396. Super 7 maintains that aspiration of this product was not an intended use, nor is it reasonably foreseeable that a hair care product would be ingested. Again, the Court of Appeals decision suggests inconsistency between an objective and subjective analysis where it held on the one hand that ingestion is not a foreseeable use, but since the ingestion caused the plaintiff's decedent to die, an issue of fact exists on whether it was a foreseeable misuse. It cannot be disputed that the specific purpose for a hair care product is to be used on one's hair and not to be drunk.

This Court of Appeals' decision will effectively cripple sellers of a product by permitting *any* misuse of a product to be actionable, regardless of the manner in which the product was used, simply because the person misusing the product died. While the circumstances surrounding the decedent's death are tragic, this type of subjective analysis is precisely the kind of litigation that the Michigan Legislature sought to prevent with its tort reform legislation. The Court of Appeals' decision was clearly erroneous and, if left to stand, will cause material injustice.

STATEMENT OF QUESTIONS INVOLVED

1. **DID THE COURT OF APPEALS ERR WHEN IT USED A SUBJECTIVE, RATHER THAN AN OBJECTIVE STANDARD IN ITS ANALYSIS OF THE OPEN AND OBVIOUS DOCTRINE?**

Plaintiff/Appellee presumably answers “no”.

Defendant/Appellant Super 7 answers “yes”.

Trial Court presumably answered “yes”.

Court of Appeals answers “no”.

2. **DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE HAIR CARE PRODUCT WAS NOT A “SIMPLE” PRODUCT?**

Plaintiff/Appellee presumably answers “no”.

Defendant/Appellant Super 7 answers “yes”.

Trial Court presumably answered “yes”.

Court of Appeals answers “no”.

3. **DID THE COURT OF APPEALS ERR IN FAILING TO RECOGNIZE PLAINTIFF-APPELLEE GREENE AS A SOPHISTICATED USER AS DEFINED BY MCL §600.2945(j)?**

Plaintiff/Appellee presumably answers “no”.

Defendant/Appellant Super 7 answers “yes”.

Trial Court presumably answered “yes”.

Court of Appeals answers “no”.

4. **DID THE COURT OF APPEALS ERR WHEN IT CONCLUDED THAT WHETHER INGESTION OF THE HAIR CARE PRODUCT IS A FORESEEABLE MISUSE OF THE PRODUCT IS A QUESTION FOR A JURY?**

Plaintiff/Appellee presumably answers “no”.

Defendant/Appellant Super 7 answers “yes”.

Trial Court presumably answered “yes”.

Court of Appeals answers “no”.

5. **DID THE COURT OF APPEALS ERR WHEN IT CONCLUDED THAT SUPER 7 AS A NONMANUFACTURING SELLER HAD THE SAME DUTY TO WARN AS THE PRODUCT MANUFACTURERS**

Plaintiff/Appellee presumably answers “no”.

Defendant/Appellant Super 7 answers “yes”.

Trial Court presumably answered “yes”.

Court of Appeals answers “no”.

STATEMENT OF FACTS

NATURE OF THE CASE

This is a products liability action brought by Plaintiff-Appellee Cheryce Greene (hereinafter Greene) for the death of Keimer Easley (hereinafter Keimer), Greene's 11 month old son. Greene alleges the following facts as to how Keimer died: she purchased a bottle of Ginseng Miracle Wonder 8 Oil, Hair and Body Mist Captivate from Defendant/Appellant Super 7 Beauty Supply [hereinafter referred to as Super 7] in April of 1999. [Appendix, p.88, 73a]. The Ginseng Miracle Wonder 8 Oil was kept in Greene's medicine cabinet in her bathroom.

Greene acknowledged that all the information she obtained from this product was from the label on the product which was provided by the manufacturer, not Super 7 who was merely the seller of the product. She clarified the reason for this purchase as follows:

Q I believe you testified that the reason that you purchased this Ginseng Miracle Wonder 8 Oil Hair and Body Mist was that it was said to be a natural oil; is that correct?

A Yes.

Q What led you to that conclusion?

A That it was natural?

Q Yes.

A Because I read the back of it, and it had all those different new oils. I would think that it would be good oils. [Appendix, p.157-58, 91a]

Super 7 made no representations whatsoever pertaining to this product other than advertising it as a "new" product:

Q Okay. You testified the reason that you originally purchased this product was that it rung to you that this was a new product; is that correct?

A Yes.

Q And you arrived at that decision because you saw a sign from the store indicating that this was a new product; is that correct?

A Yes.

Q All right. Do you recall this particular sign?

A It was just a little sign that had new on there.

Q Okay. Other than the word new, did the sign state anything else about this product?

A No.

Q All right. And other than this sign that said new, were there any other representations made by any employee at this particular store regarding this Ginseng Miracle Wonder 8 Oil Hair and Body Mist product?

A No. **[Appendix, p159, 91a]**

On June 28, 1999 Greene arrived home from work around 9:15 p.m. Keimer was being watched by Nicole Price, cousin of Keimer. Greene told Nicole to leave Keimer in his playpen because she was going upstairs to program her television. Somehow, Keimer ended up in Greene's bedroom. Greene says that at first she did not notice her son in her room, but that when she turned around, she saw Keimer holding the container of oil in his hand and he had oil in his mouth. **[Appendix, p106, 78a]**. Greene does not know how Keimer got a hold of the bottled oil. Greene says she called 911, but eventually took Keimer to Grace Hospital herself with Nicole. **[Appendix, pp122-24, 82a]**. Keimer was eventually transferred to Children's Hospital in Detroit, but never recovered and died on July 30, 1999.

Super 7 was merely the seller of the product and not the manufacturer. Raani Corporation manufactured the product at issue. Defendant/Appellant, A.P. Products, is in charge of supplying the bottles to Raani Corporation. Appellant, A.P. Products supplied the warnings and then distributed the end product. **[Appendix, A.P. Products' Answers to Interrogatories, 99a-100a, 105a]**. Revlon is the successor company to A.P. Products. Raani Corporation previously filed a Motion for Summary Disposition on the basis that the product

at issue was fit for a particular purpose and fit for the ordinary purpose for which goods are used and therefore, merchantable. Raani further alleged that Greene failed to establish any acts of negligence because Raani sold to a sophisticated user, A.P. Products. Upon hearing oral arguments in this matter, this honorable Court granted Raani's Motion for Summary Disposition on December 23, 2002.

PROCEDURAL HISTORY

On May 21, 2003, Judge Kaye Tertzag of the Wayne County Circuit Court heard oral arguments on Motions for Summary Disposition filed by Super 7, A.P. Products LTD, and Revlon Consumers Products Corporation. Upon hearing oral arguments and reviewing the briefs of all parties, Judge Tertzag granted all Defendants Motions for Summary Disposition and dismissed Greene's case in its entirety. [Appendix 37a-38a].

Greene filed an appeal wherein the Court of Appeals reversed the trial court's decision granting summary disposition. *Greene, supra*. The Court of Appeals held that it cannot be concluded as a matter of law that the risk of death or fatality from the ingestion of the Wonder 8 Oil would be obvious to a reasonably prudent product user and be a matter of common knowledge, especially considering the lack of any relevant warning. In addition, the Court of Appeals held that a reasonable jury could conclude that the product would have been used and treated differently had the warnings been given and that had the product been locked up more securely, it would not have found its way into Keimer's hands. As a result, an issue of fact existed as to proximate cause. The court further found that a question of fact existed as to whether Keimer's act of ingesting the product was a reasonably foreseeable misuse of the product.

Finally, the Court of Appeals held that a question of fact existed as to whether Super 7, breached an implied warranty of merchantability. The Court of Appeals stated that, "We have already determined here that the issues of whether the Wonder 8 Oil required a warning, or in

other words whether the product was adequately labeled, and whether proximate cause was established are questions for the jury. Accordingly, dismissal of plaintiff's claims premised on breach of implied warranties was in error." *Greene, supra* at 411. The Court of Appeals decision was improper under Michigan's tort reform legislation. In essence, the Court of Appeals is saying that any product which is misused, and through that misuse causes death, would always be a question for a jury regarding whether the manufacturer and seller had a duty to warn. This Court granted leave to resolve these issues regarding Michigan's tort reform legislation for products liability.

CONCISE LEGAL ARGUMENT

I. STANDARD OF REVIEW

The issue presented to this Court is what duty does a nonmanufacturing seller owe to a plaintiff/consumer in product liability action in accordance with Michigan's tort reform legislation. Questions of statutory interpretation are reviewed de novo. *Oade v Jackson Nat's Life Ins Co*, 465 Mich 244, 250 (2001). Moreover, this Court's review of a trial court's decision to grant or deny a motion for summary disposition is de novo. *Beaudrie v Henderson*, 465 Mich 124 129 (2001).

II. SUPER 7 DID NOT HAVE A DUTY TO WARN GREENE OF THE DANGER ASSOCIATED WITH INGESTION OF A HAIR CARE PRODUCT

Products liability claims in Michigan are based on statutes and are fault based. *Ryan v Brunswick Corporation*, 454 Mich 20, 27 (1997). The revisions to Michigan's product liability statutes that took effect in 1996, defined a product liability action as an action based on a "legal or equitable theory of liability brought for the death of a person or injury to a person or damage to property caused by the production of a product." MCL §600.2945(h). The statute goes further to define "production" as the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling" of a product. MCL §600.2945(i).

In order to establish a prima facie products liability cause of action, a plaintiff has the burden of establishing either directly or through circumstantial evidence that the defendants supplied a product that was defective and that defect caused the injury. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500 (1996). In the present action, the plaintiff's defect claim is premised on a failure to warn theory. The failure to warn theory is based on negligence principles:

A product can be defective in the kind of way that makes it unreasonably dangerous by failing to warn or failing adequately to warn about a risk or hazard related to the way a product is designed . . . A claimant who seeks recovery on

this basis must . . . prove that the manufacturer-designer was negligent. There will be no liability without a showing that the defendant designer knew or should have known through the exercise of ordinary care of the risk or hazard about which he failed to warn. Moreover, there will be no liability unless the manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public.

Prosser & Keaton, Torts, (5th ed), §99, p 697.

The issue before this Court is whether a non-manufacturing seller has a duty to warn the plaintiff/user of the danger associated with a child who ingests hair/body moisturizing oil. Super 7 contends that it did not have a duty to warn Greene based on the tort reform legislation limiting the duties of a non-manufacturing seller to exercising reasonable care. *See* MCL §600.2947(6). In the event this Honorable Court holds a seller to the same duty to warn as that of a manufacturer, Super 7 contends that the Court of Appeals' reversal of the trial court's granting of summary disposition was improper as the danger posed by ingestion of a hair care product was open and obvious and therefore Super 7 did not have any duty to warn Greene.

A. THE COURT OF APPEALS ERRED WHEN IT USED A SUBJECTIVE, RATHER THAN AN OBJECTIVE STANDARD IN FINDING THAT INGESTION OF THE HAIR CARE PRODUCT WAS NOT OPEN AND OBVIOUS BECAUSE THERE WAS NO WARNING THAT INGESTION COULD BE FATAL

By its very nature, it is readily apparent to an average person of ordinary intelligence that ingesting a hair solution product would be harmful. The Court of Appeals agreed with this premise, but imposed a higher duty upon the defendants, when it held that while ingesting a hair solution product may be harmful, it was not reasonable to anticipate that the ingestion would cause a person to die. Specifically, the court held:

Here, the risk of possibly becoming ill from the ingestion of the hair and body care product would probably be obvious to a reasonably prudent product user and would likely be a matter of common knowledge to a person in the same or similar position as the plaintiff. We cannot conclude, however, that as a matter of law, the risk of death from the ingestion of Wonder 8 Oil would be obvious to a reasonably prudent product user and be a matter of common knowledge, especially considering the lack of any relevant warning.

Greene, supra at 401.

Based on the ruling, it appears that the Court of Appeals applied a subjective analysis in determining that ingestion of the hair care product was not open and obvious because it was fatal. The Court of Appeals erred in finding that ingestion of the oil causing harm is open and obvious but ingestion causing death is not. The “open and obvious” doctrine is commonly applied in products liability and premises liability cases as a limitation on the duty to warn. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610, 614 (1995).

In general, there is no obligation to warn someone of dangers that are so obvious and apparent that a person may reasonably be expected to discover them and protect himself or herself. Prosser & Keaton, Torts (5th ed), §61, p 427. The rationale underlying this doctrine is that “there should be no liability for failing to warn someone of a risk or hazard [that] he appreciated to the same extent as a warning would have provided.” Prosser & Keaton, §96, p 686.”

Laier v Leonard K Kitchen, 266 Mich App 482, 487 (2005).

In *Resteiner v Sturm, Ruger & Co, Inc*, 223 Mich App 374 (1997), the open and obvious doctrine was applied to a revolver on a products liability claim for a failure to warn against the danger of a theft. “The manufacturer of a simple product has no duty to warn of the product’s potentially dangerous conditions or characteristics when they are readily apparent or visible upon casual inspection and reasonably expected to be recognized by the average user of ordinary intelligence. *Id* at 380.

Thus, it is undisputed that this “open and obvious” defense is available to Super 7 in response to Greene’s allegations of products liability based on a failure to warn. *Glittenberg v Doughboy Recreational Indus*, 441 Mich 379, 390 (1992). The *Glittenberg* court explains its reasoning as follows:

“In the context of warnings of the obvious danger of simple products, the duty inquiry asks whether people must be told what they already know. Warnings protect consumers where the manufacturer or seller has superior knowledge of the products’ dangerous characteristics and those to whom the warning would be directed would be ignorant of the facts that a warning would communicate. Thus, it has been observed that no duty exists where “the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the product” 3 Products

Liability, *supra*, §§ 33:25, p 55. Anno: 76 ALR2d 29-30. See also Madden, *The duty to warn in products liability: Contours and criticism*, 89 W Va L R 221, 231 (1986).” *Glittenberg, supra* at 391.

The determination of the "obvious" character of a product-connected danger is objective. In deciding a motion for summary disposition, the trial court must focus on the objective nature of the condition of the product at issue. *See, for example, Lugo v Ameritech Corp*, 464 Mich 512 (2001) (discussing the open and obvious doctrine in the context of a premises liability claim). Whether a danger is open and obvious depends on whether it is reasonable for a typical user to discover the danger associated with the product’s use as the danger is fully apparent, widely known, commonly recognized, and anticipated by the ordinary user or consumer. *Glittenberg, supra* at 391-92. This test focuses on the reasonably prudent person and is therefore objective in nature. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10 (2004).

The Court of Appeals, in the present action, however, failed to employ this objective standard when it reversed the trial court’s granting of Super 7's summary disposition motion. In holding that the risk of death would not be obvious, but that the risk of harm from ingesting the hair oil would be obvious, the court erred because its analysis employed a subjective test. Moreover, a plaintiff’s¹ subjective knowledge is immaterial to the antecedent determination of an open and obvious danger. *Glittenberg, supra* at 393. If reasonable minds cannot differ on the

¹ The fact that the decedent was a minor is irrelevant for purposes of the open and obvious doctrine. Michigan case law holds that the open and obvious danger doctrine applies to minors in products actions. *Mallard v. Hoffinger Industries, Inc.*, 210 Mich App 282 (1995). The reasoning behind this is articulated by the Court of Appeals in *Stopczynski v. Woodcox*, 258 Mich App 226 (2003):

"We tend to agree with defendant Pool Town's comment that, if a child is capable of understanding a warning, the dangerous condition would be obvious to the child, rendering the warning unnecessary. Conversely, if the condition is not obvious to the child, then a warning would likely be of little use."

This reasoning is as applicable to premises liability cases as it is to products liability cases. That is, in either case, if the minor is sufficiently immature to appreciate the dangerous condition, he is also sufficiently immature to appreciate the warning.” *Stopczynski, supra* at 232, [citing *Pigeon v. Radloff*, 215 Mich App 438 (1996), 447-448 (Sawyer, J., dissenting).]

‘obvious’ character of the product-connected danger, the court determines the question as a matter of law. *Id* at 399. Thus, the Court of Appeals was required to determine whether a reasonable person in Greene’s position would foresee the danger, not whether Greene should have foreseen the danger. *Mann, supra* at 329.

The Court of Appeals, in its ruling, stated that, “Even if a reasonable person would be conscious of possible harm or of a vague danger associated with the product, it does not preclude a jury from finding that a warning was nonetheless required to give [the purchaser] a full appreciation of the seriousness of the life-threatening risks involved.” *Greene, supra* at 402. In the case at bar, there is far more than merely “possible harm” or of a “vague danger”. It is beyond reasonable dispute that ingestion of a hair care product, **especially by an 11 month old child**, could result in serious physical harm, including, but not limited to, death.

Finally under a products liability failure to warn theory, a duty is imposed on sellers to transmit safety-related information when they know or should know that the buyer or user is unaware of that information. See *Glittenberg, supra* at 386. In this case, Greene failed to establish a *prima facie* claim based on failure to warn under Michigan’s tort reform Legislation. According to MCL §600.2948(2):

A defendant is not liable for failure to warn of a material risk that is should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

Here, even the Court of Appeals agreed that had Greene herself ingested the oil, that there would be no claim on a failure to warn because it is a matter of common knowledge for a consumer not to ingest the product. *Greene, supra* at 401. Where the Court of Appeals erred was in ignoring MCL §600.2948 and instead choosing to create an new category of products liability law related to death of children who misuse a product purchased for an adult. While it is true there were no warning labels on the product indicating that death was a possible side-

effect of ingesting the oil, it is a matter of common knowledge that ingesting a body care product may cause serious medical consequences. Accordingly, because the risk of harm was obvious, *supra*, the failure to warn claim was properly dismissed by the trial court.

B. THE HAIR CARE PRODUCT AT ISSUE IS A ‘SIMPLE’ PRODUCT AS DEFINED UNDER MICHIGAN PRODUCTS LIABILITY LAW

In the present action, the Court of Appeals stated:

Although in a general sense, a hair and body care product is a “simple” product, it cannot be considered simple when considering the numerous ingredients and compounds that are used to make the product. To a great degree, these ingredients and their benign or dangerous qualities most certainly are not within the realm of knowledge of a layperson.

Greene, supra at 401. A manufacturer or seller has no duty to warn or protect against the open and obvious dangers associated with simple tools. *Glittenberg, supra* at 393. In the analysis above, Super 7 has established that ingesting of the hair moisturizer was an open and obvious danger, *supra*. However the analysis does not end there. Although Super 7 has no duty to warn of open and obvious dangers, this Court narrowed the no-duty rule to cases involving simple tools or products. *Id.*

In *Viscogliosk² v Montgomery Elevator Co*, 208 Mich App 188 (1994), the Court of Appeals adopted two tests to determine whether a product is a simple tool. In *Viscogliosk*, the product at issue was a moving walkway at the airport. Michigan courts have categorized products as simple tools where **one or both** of the following conditions exist: a) is the product highly mechanized or b) does the intended use place the user in an obviously dangerous position. *Viscogliosk, supra* at 189.

² The *Viscogliosk* Court actually adopted the simple tool standard found in *Raines v Colt Industries*, 757 F Supp 819, 825 (ED Mich, 1991). In *Raines*, the Federal District court found that a semi-automatic pistol was a simple tool.

In this case, the Court of Appeals found that the moisturizer was not a simple tool because there were “numerous ingredients and compounds” used to make the product. *Greene, supra* at 401. The problem with the Court of Appeals analysis is that there is no case law to support such an assertion. On the contrary, case law involving complicated machinery focuses on the way the product is used rather than on its underlying mechanical parts. See *Adams v Perry Furniture Co* (On Remand), 198 Mich. App. 1, 12; 497 N.W.2d 514 (1993); *Coger v Mackinaw Products Co*, 48 Mich. App. 113, 121-122; 210 N.W.2d 124 (1973); *Byrnes v Economic Machinery Co*, 41 Mich. App. 192, 198; 200 N.W.2d 104 (1972).

Under the Court of Appeals analysis, every food product from a bag of potato chips to children’s cereal would not be considered “simple” products because of the litany of difficult to pronounce ingredients listed in our food products today. In this case, Super 7 contends that the proper classification is that the moisturizer was a “simple tool” because the intended use (to moisturize a person’s hair and body) does not place the user in an obviously dangerous position. Similarly, the Court of Appeals in *Viscoglioske* found that although the walkway may have been mechanically complicated, the walkway did not place users in an obviously dangerous position; and, therefore, it was a simple tool. *Viscoglioske, supra* at 189. Other examples of “simple tools” include an above ground swimming pool (*Glittenberg, supra* at 384-385) and a butane lighter (*Adams v Perry Furniture Co* (On Remand), 198 Mich App 1 (1993)). Accordingly, the Court of Appeals erred in finding that the product was not a simple product and therefore, using the objective analysis of the open and obvious defense, *supra*, summary disposition was appropriate.

C. SUPER 7 IS NOT LIABLE IN A PRODUCTS LIABILITY ACTION FOR FAILURE TO PROVIDE AN ADEQUATE WARNING WHEN THE PRODUCT IS PROVIDED FOR USE BY A “SOPHISTICATED USER.”

Admittedly, Super 7 has never raised the defense that Greene was a sophisticated user of the product as defined by MCL §600.2945(j). However, in response to this Court’s order, Super 7 will address the argument of classifying Greene as a sophisticated user. MCL

§600.2947(4) provides that “except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.

MCL §600.2945(j) defines “sophisticated user”:

Sophisticated user means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product’s properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product’s potential hazard or adverse effect that caused the injury is not a sophisticated user.

A duty to warn a purchaser of the inherent dangers of a product does not arise in a situation where the purchaser is a sophisticated user because a sophisticated user is charged with knowledge of the product. The rationale behind the sophisticated-user doctrine is that the manufacturer markets a particular product to a class of individuals that are presumed to be experienced in using and handling the product. Due to this special knowledge, the manufacturer is relieved of a duty to warn. *Portelli v IR Construction Products Co*, 218 Mich App 591, 601 (1996).

In this case, an analogy may be made that the manufacturers and Super 7 ultimately sold the hair/body oil to Greene who based on her life experiences was a sophisticated user of this common personal hygiene product. Thus, it was up to Greene, as parent of the decedent, to warn her child and/or her niece of the dangers associated with ingesting the product. One of the limits of a manufacturer’s duty to warn is this sophisticated user doctrine. In this case, Greene testified that she would not let her son taste the oil because she thought that it could be harmful. [Appendix, p121-22, 82a]. Greene frequently shopped for perm supplies every two to three weeks. [Appendix, p79-80, 71a]. However, even if this Court does not find Greene to be a sophisticated user, it does not change the fact that the danger/defect was open and obvious; and, therefore, summary disposition was appropriate.

D. INGESTION OF THE HAIR OIL WAS NOT A FORESEEABLE MISUSE OF THE PRODUCT

In the present action, the Court of Appeals believed that an issue of fact exists on whether a warning label was necessary on the hair and body moisturizer. In reaching this conclusion, the Court of Appeals gave the inconsistent holding that “[a]n adult ingesting the product is not a reasonably foreseeable misuse, while ingestion by a child or toddler could be reasonably foreseeable.” *Greene, supra* at 409. This is not the law in the state of Michigan.

An unforeseeable misuse of a product is an absolute defense for a manufacturer or a seller in a products liability action. *Belleville v. Rockford Mfg. Group, Inc.*, 172 F Supp 2d 913 (ED Mich, 2001). Michigan law specifically states that a manufacturer or seller is not liable in a product liability action for harm caused by the misuse of the product unless the misuse was reasonably foreseeable. MCL §600.2947(2).

In Michigan, manufacturers have a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of their products. *Glittenberg, supra* at 385. However, it is important to note that manufacturers are not insurers that under all circumstances no injury will result from the use of their products. *See Owens v. Allis-Chalmers Corp.*, 414 Mich 413, 432 (1982). Thus, the scope of the duty to warn is not unlimited, as the manufacturer must have (a) actual or constructive knowledge of the claimed danger; (b) have no reason to believe that the user will realize the dangerous condition; and (c) failed to exercise reasonable care to inform the user of its dangerous condition. *See Glittenberg, supra* at 389-390. The inquiry to determine whether a misuse is foreseeable is determined if the misuse was common practice and whether the manufacturer was aware of the misuse. *Mach v. General Motors Corp.*, 112 Mich App 158, 163 (1982). In this case, Greene presented no evidence that ingestion of the product was common practice nor did it present any knowledge by the defendants of this practice. There can be no dispute that ingestion of a hair care product is **not** a common practice.

Further it is well settled that manufacturers have a duty to design their products “to eliminate any unreasonable risk of foreseeable injury.” *Ghrist v Chrysler Corp*, 451 Mich 242, 248 (1996). A plaintiff can show that a product was rendered defective by the manufacturer’s failure to warn potential users of dangers involving the intended uses and foreseeable misuses of the product. *See Gregory v Cincinnati, Inc*, 450 Mich 1, 11 (1995). The tort reform legislation further clarified this duty under MCL §600.2947(2) which states:

A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was a misuse of a product and whether the product was reasonably foreseeable are legal issues to be resolved by the court.

Misuse is defined in MCL §600.2945(e):

Misuse means use of a product in a materially different manner than the product’s intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

The Court of Appeals committed error when it suggested that the ingestion of a hair care product by an infant is a reasonably foreseeable misuse because the product did not have any warning labels telling the adult not to drink the product, when the Court of Appeals already ruled that ingestion by an adult is not a reasonably foreseeable misuse. This analysis is inconsistent.

Since the tort reform legislation there has been little precedent regarding the interpretation of foreseeable misuse. It is well settled that in Michigan, manufacturers and sellers have a duty to warn about dangers associated with the intended uses and foreseeable misuses of a product. *See for example Antcliff v State Employees Credit Union*, 414 Mich 624, 637-638 (1982). In the present action, Greene contends that had there been a warning, indicating that ingestion

of the contents was harmful, she would have taken additional precautions with keeping the product away from her child. “In most failure-to-warn cases, proximate cause is not established absent a showing that the plaintiff would have altered his behavior in response to a warning.” *Allen v Owens Corning Fiberglas Corp*, 225 Mich App 397, 406-407 (1997).

Foreseeability of misuse may be inherent in the product or may be based on evidence that the manufacturer had knowledge of a particular type of misuse. *Shipman v Fontaine Truch Equipment Co*, 184 Mich App 706, 713 (1990). In this case, there are no facts establishing that ingestion of the hair oil is inherent in the product itself. Moreover, Greene has failed to establish that Super 7 and/or the manufacturer had any knowledge that a child would ingest this product. A manufacturer has a duty to warn if it has actual or constructive knowledge of a danger that is not obvious to users and the manufacturer failed to use reasonable care in informing users of this danger. See *Glittenberg, supra* at 389-390. Super 7 contends that concept of foreseeability of misuse would be unfairly stretched by a conclusion that the manufactures should have warned the user not to ingest the hair/body oil. To hold otherwise, would place a duty to warn on every manufacturer of every body care product available in the marketplace today. This should not be necessary public policy. Stretched to its inevitable conclusion, every product would then need a warning that it may be harmful.

Greene failed to establish her failure to warn theory because she is unable to establish that the lack of a warning was a defect. This issue was properly decided by the trial court in accordance with MCL §600.2947(2) which states that a manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Greene failed to show how ingestion was reasonably foreseeable. The Court of Appeals reversal of this decision by leaving the ultimate determination in the hands of a jury was in err because MCL §600.2947(2) goes on to state that whether the misuse was reasonably foreseeable is a legal issue to be resolved by the court. It is disingenuous for Plaintiff to suggest

that her actions (or inactions) of leaving this hair care product available where her 11 month old son could reach it, would have been any different if there were warning labels on the bottle. Accordingly, summary disposition was appropriate.

E. SUPER 7 AS A NONMANUFACTURING SELLER DID NOT OWE GREENE ANY DUTY TO WARN.

Though this issue was not specifically asked by this Court to be addressed in this appeal, Super 7 believes that it is an issue of first impression which should also be considered by Michigan's highest court. Super 7 maintains that it is shielded from liability pursuant to MCL §600.2947(6). Thus, even if this Court does not believe that the Court of Appeals committed error with respect to the previous four arguments as to the Defendants/Appellants manufacturers, Super 7, as a non-manufacturing seller should still be dismissed from this products liability lawsuit. Under Michigan's tort reform legislation, Super 7 contends that the liability of a "non-manufacturing seller" in product liability causes of action is severely limited. "The cardinal rule of all statutory construction is to identify and give effect to the intent of the Legislature. The first step in discerning intent is to examine the language of the statute in question." *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 398 (1998). Unlike a manufacturer, a seller's duty to a consumer/plaintiff is specifically defined by MCL §600.2947(6) which states as follows:

In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

- (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.
- (b) The seller made an express warranty³ as to the product, the product failed to conform to the

³ The plaintiff's complaint does not allege any breach of an expressed warranty. Thus, the only plausible theory against this Appellant/seller is a theory for breach of an implied warranty. The appellee's failure to establish a breach of implied warranty will be discussed and analyzed, *infra*.

warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Thus, inapposite to a manufacturer, Super 7 contends that the plain language of MCL §600.2947(6) states that a non-manufacturing seller of a product's duty is limited to either a breach of an expressed warranty or a failure to exercise reasonable care, which includes a breach of an implied warranty. To the extent the Court of Appeals decision holds Super 7 to the same duties as the manufacturers, the Court of Appeals erred. Wherein footnote 7 the Court of Appeals contended that Super 7 position lacks merit, there is no precedent to support either position. *Greene, supra* at 404. In fact, the legislative history behind the tort reform legislation further supports Super 7's position of limiting the liability of a seller. The legislative history states:

By holding sellers responsible only for their own wrongdoing, the bill would eliminate unnecessary and burdensome legal costs and insurance premiums. Since manufacturers ultimately indemnify sellers for the harm caused by the manufacturers own products, claims should be brought directly against them.

[**Appendix, Senate Fiscal Agency Analysis of S.B. 344, p 11, 126a.**] It is well established that the primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *See In re MESTER Trust*, 457 Mich 371, 379-380 (1998).

Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning. *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). The statute at issue, specifically states that “a seller other than a manufacturer **is not liable** for harm” unless either one of two theories exist. MCL §600.2947(6). The plain meaning of these words leads to the one conclusion that the only duty owed by a non-manufacturing seller is for breach of expressed warranty or failure to act reasonably, which includes breach of implied warranty. If the language of a statute is clear and unambiguous, no interpretation is necessary and the court must follow the clear working of the statute. *American Alternative Ins Co, Inc v York*, 470 Mich 28, 30 (2004). The clear and

unambiguous language of MCL §600.2947(6) precludes Greene's failure to warn claims because such a claim does not involve an allegation that Super 7 failed to exercise reasonable care or made an expressed warranty.

Where the Court of Appeals erred was in ignoring this plain language of the statute and instead relying on other provisions in the statute where the Legislature chose to lump sellers and manufacturers as the same entities.⁴ However, despite this possible inconsistency in the statutes, it is Super 7's contention that it was the intention of Michigan's Legislature to only hold non-manufacturing sellers liable under a product liability theory if they breached an express warranty or if they failed to exercise reasonable care under an implied warranty theory. **Michigan law is undecided on this issue.**

1. **SUPER 7 DID NOT BREACH AN IMPLIED WARRANTY NOR DID IT FAIL TO EXERCISE REASONABLE CARE IN THE SALE OF THE PRODUCT TO GREENE**

In the event, this Court holds a non-manufacturing seller's duty is limited to MCL §600.2947(6), summary disposition by the trial court was proper because there is no allegation of a breach of express warranty and because Greene failed to establish that Super 7 failed to exercise reasonable care under a breach of an implied warranty. The Michigan legislature specifically limited the liability of a "nonmanufacturing seller" in product liability causes of action. To establish a cause of action for breach of implied warranty, a plaintiff must prove that the product was *not fit for its intended, anticipated or reasonably foreseeable purposes* and that it therefore caused the plaintiff's injury. *Gregory, supra at 34*. Furthermore, MCL §440.2314(2)(c) states, "Goods to be merchantable must be at least such as (c) are fit for the ordinary purposes for which such goods are used ..." Additionally, MCL §440.2315 states that there is an "implied warranty that the goods shall be fit for . . ." a particular purpose.

⁴ For example, MCL §600.2947(1) states "a manufacturer or seller" is not liable. . . and this lumping together of "manufacturers and sellers" is used throughout the products liability statutes.

In *Guaranteed Constr. Co. v Gold Bond Products*, 153 Mich App 385, 392 (1986), the implied warranties are defined as follows:

The warranty of merchantability requires that the good sold be of average quality within the industry. A warranty of fitness for a particular purpose requires that the goods sold be fit for the purpose for which they are intended; in order to take advantage of this type of warranty, the seller must know, at the time of the sale, that the particular purpose for which the goods are required and also that the buyer is relying on the seller to select or furnish suitable goods.

In the instant action, Greene failed to present any evidence that she relied on Super 7 to select or furnish suitable goods. Additionally, Greene did not allege, nor did she provide any evidence that oil was not of average quality within the industry. On the contrary, Greene testified that:

Q When you used the product, were you satisfied with the results you were getting with your hair?"

A Somewhat. * * *

* * *

Q But it was - you were satisfied enough with it to continue to use it; correct?

A Yes.

* * *

Q Did you notice anything about the product that you liked better than the Iso Plus?

A It just moisturizes it a little more, but it was, you know, it was oily like." [Appendix, pp 95-96, 75a].

As Appellee's own testimony clearly delineates, the product at issue served its purpose as a hair moisturizer and was, therefore, not defective. Appellee has failed to establish any acts of negligence against Super 7. Moreover, there is no breach of implied warranty because the product was fit for its particular purpose as a hair moisturizer. Without evidence of either of

these two implied warranties, Greene's allegations against Super 7, the non-manufacturing seller, fail as a matter of law.

Furthermore, it is undisputed that the Ginseng Miracle Wonder 8 Oil was of merchantable quality. The ordinary purpose for which this good is supposed to be used for is as a hair moisturizer. Moreover, there is no dispute that its ordinary purpose does not include ingestion of the product. Furthermore, ingestion by Greene's son was not reasonably foreseeable. Thus, Greene may not claim that there was a breach of implied merchantability when Ginseng Miracle Wonder 8 Oil was used in a way that was not for the ordinary purpose for which goods are used.

Greene's claim of breach of implied warranty against Super 7 was properly dismissed by the trial court as a matter of law due to the fact that there is no evidence to suggest same. The parameters of an implied warranty pursuant to MCL 440.2314 are as follows:

- (1) ...a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind...
- (2) Goods to be merchantable must be at least such as ...(e) are adequately contained, packaged and labeled as the agreement may require.

A seller, pursuant to the implied warranty of merchantability under the sales article of the Uniform Commercial Code, warrants that the goods are fit for the ***ordinary purposes for which the goods are used***. *Latimer v William Mueller & Son, Inc.*, 149 Mich App 620 (1986). A buyer of goods, to establish a prima facie case of breach of an implied warranty of merchantability, must show that the goods were defective when they left the possession of the manufacturer or seller; a defect is established by proof that the goods were ***not reasonably fit for their intended, anticipated or reasonably foreseeable use***. *Guaranteed Constr, supra* at 392. The implied warranty of merchantability does **not** apply where the buyer uses the goods in a manner other than intended. *Id* at 393.

Thus, there is no breach of implied warranty because the product was fit for its particular purpose as a hair moisturizer. In its decision, the Court of Appeals relies upon *Bouverette, supra*,

in support of their position that a question of fact exists as to whether Appellant, Super 7, can be held liable for breach of implied warranty. It is important to note from the onset, that *Bouverette* did not involve a claim against the non-manufacturing seller, like Super 7 in this case. Moreover, the Court of Appeals failed to distinguish a critical fact between *Bouverette* and the case at bar. The Court of Appeals in the case at bar states as follows:

“In certain factual contexts, negligence and breach of implied warranty may resolve the same elements and proofs, yet the theories remain separate causes of action. *Bouverette v. Westinghouse Electric Corp.*, 245 Mich App 391; 628 NW2d 86 (2001). In *Bouverette*, this Court found that there was ample evidence to establish a prima facie case of breach of implied warranty **predicated on a failure to warn**, where the deceased was electrocuted while working on a control panel for an industrial welding machine, and where there was evidence that the instruction and installation manual did not provide a needed warning in regard to the mechanism that caused the electrocution. *Id* at 396.”

Greene, supra at 412.

However, the Court of Appeals ignored the fact that implied warranty and failure to warn are separate theories. The finding of the Court in *Bouverette* is that in a claim for breach of implied warranty, a plaintiff must prove that the product was not reasonably fit for its intended, anticipated or reasonably foreseeable use. *Bouverette, supra* at 396. Again, Super 7 reiterates that it was not intended nor reasonably foreseeable that a hair product would be ingested by a child. The Court of Appeals erred by summarily lumping in its ruling on the failure to warn theory with the breach of implied warranty theory. To the extent that *Bouverette*, holds otherwise, such a theory should be overruled as it is in conflict with MCL §600.2947(6) and Supreme Court precedent.

Michigan courts have consistently held that the implied warranty of merchantability does **not** apply where the buyer uses the goods in a manner other than intended. *Guaranteed Constr. Co.*, 153 Mich App at 393. In order to establish a cause of action for breach of implied warranty, a plaintiff must prove that the product was **not fit for its intended and reasonably**

foreseeable purposes and that it therefore caused the plaintiff's injury. *Gregory v Cincinnati, Inc.*, 450 Mich 1; 538 NW2d 325 (1995), *Dooms v. Stewart Bolling & Co.*, 68 Mich. App. 5; 241 N.W.2d 738 (1976); *Elsasser v. American Motors Corp.*, 81 Mich App 379, 384; 265 NW2d 339 (1978); *Lagalo v. Allied Corp.*, 457 Mich 278, 286, n9; 577 NW2d 462 (1998).

Other jurisdictions follow this principle as well. In *Walsh v Hayward Industrial Products*, 7 Fed. Appx. 72; 2001 U.S. App. LEXIS 5280 (2001), the 2nd Circuit affirmed a grant of summary judgment to the defendant. The plaintiff was injured when a valve burst while he was investigating a pipe stoppage at the wastewater treatment facility where he worked. As to the claim that the implied warranty of merchantability was breached, the court found the plaintiff had not shown the product was unfit for its ordinary purposes or that it was being used in the customary, reasonably foreseeable manner. [Appendix, 133a].

Under Minnesota law, an implied warranty of merchantability is defined as requiring that goods be fit for the ordinary purposes for which such goods are used. This warranty is breached when the product is defective to a normal buyer *making ordinary use of the product*. *Peterson v Bendix Home Systems*, 318 N.W.2d 50; 1982 Minn. LEXIS 1528 (1982). [Appendix, 134a-39a].

Under Georgia law, where a product is safe when used in a normal manner, there is no breach of the implied warranty of merchantability. If the facts show that the product was safe when used as *intended*, and that the alleged damage resulted from a use in *other than a normal manner*, there was no breach of implied warranty. *Caldwell v Lord & Taylor*, 142 Ga.App. 137; 235 S.E.2d 546 (1977). [Appendix, 140a-141a].

As Appellee's own testimony clearly delineates, the product at issue served its purpose as a hair moisturizer and was, therefore, not defective. Appellee has failed to establish any acts of negligence against Super 7. Moreover, there is no breach of implied warranty because the product was fit for its particular purpose as a hair moisturizer. Accordingly, summary disposition was appropriate, and the Court of Appeals' reversal was improper.

In conclusion, to hold a seller liable for failure to provide a warning is contrary to the intent of Michigan's legislature. One of the salient issues under Michigan's tort reform legislation was the rationale that "many believe that a wholesaler or retailer should not be held liable unless the seller's negligence caused the injury." [Senate Fiscal Agency Analysis of S.B. 344, p1]. The current tort reform legislation establishes a fault based standard of liability for a seller. It cannot be disputed that Greene did not look to Super 7 to warn her of the dangers of ingestion. Thus, the product was fit for its intended purpose, to be used topically, not to be ingested. Accordingly, summary disposition was appropriate, and the Court of Appeals' reversal was improper.

RELIEF REQUESTED

WHEREFORE, Defendant/Appellant Super 7 Beauty Supply Incorporated respectfully requests this Honorable Court REVERSE the decision of the Court of Appeals Court and dismiss Plaintiff/Appellee's lawsuit in its entirety with prejudice as to Defendant Super 7.

Respectfully submitted,

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